IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1313

GARY JAMES COLLINS,

Petitioner,

vs.

~~STATE OF~~ IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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ATTORNEYS FOR PETITIONER

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The Petitioner, Gary James Collins, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Iowa entered in this proceeding on December 17, 1975.

OPINION BELOW

The opinion of the Supreme Court of Iowa has been published at 236 N.W. 2d 376 (1975) and appears as Appendix A.

JURISDICTION

On the 17th day of December, 1975, the Supreme Court of Iowa filed its Opinion and Judgment (see Appendix A). Petitioner filed no motion for a rehearing of this matter by the Supreme Court of Iowa and has neither requested nor received an order granting an extension of time within which to file a

petition for certiorari. The jurisdiction of this Court is invoked under Title 28 U.S.C.§ 1257(3).

QUESTIONS PRESENTED

1. Should the prophylactic rules of *Miranda v. Arizona* 384 U.S. 436 (1966) be extended to a state psychiatrist who interviews a defendant in custody in a state security medical facility during the course of a court ordered mental examination on competency to stand trial so as to exclude such psychiatrist's testimony during the state's case in chief about the defendant's confession to him during the course of the examination.

2. Does the introduction at a part of the state's case in chief of defendant's confession to a state psychiatrist made while the defendant was in custody in a state security medical facility during the course of a court ordered mental examination violate defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendments V, VI and XIV of the Constitution of the United States are set forth in Appendix B.

STATEMENT OF THE CASE

Gary James Collins was convicted upon a jury trial in Jasper County District Court, State of Iowa, of the crime of assault with intent to commit rape, in violation of Section 698.4 of the 1973 Code of Iowa. The case was appealed to the Supreme Court of Iowa. The Supreme Court of Iowa affirmed the conviction. *State v. Collins* 236 N.W.2d 376 (1971).

The events leading to the trial and conviction of Gary James Collins are as follows:

On January 7, 1974, the petition was arrested and placed under the custody of the State of Iowa.

On January 28, 1974, the Jasper County Attorney filed an Information against Petitioner, Gary James Collins, charging him with Assault with Intent to Commit Rape in violation of Section 698.4, Code of Iowa, 1973.

On January 31, 1974, the Petitioner filed an application for a mental evaluation regarding competency to stand trial and possible medical treatment by the Iowa Security Medical Facility, Oakdale, Iowa.

The Petitioner's application was granted on February 4, 1974, in that the Court found the petitioner should be evaluated to determine his competency to stand trial.

On February 11, 1974, the Petitioner filed application for a physical examination and medication.

The Petitioner's application for an examination and medication was granted on February 11, 1974.

The Petitioner was admitted to the psychiatric facility at Iowa Security Medical Facility at Oakdale, Iowa for mental evaluation on February 20, 1974, and remained at that institution under the custody of the State of Iowa until he was released on May 7, 1974. During this time the Petitioner was examined by Dr. Romullo Lara, a psychiatrist, employed by the Bureau of Adult Corrections, State of Iowa and operating at the Iowa Security Medical Facility.

During the course of these examinations, the Petitioner made admissions to the psychiatrist regarding his commission of the crime for which he was charged without the presence of counsel for the Petitioner and absent any formal explanation of the Petitioner's Constitutional rights or waiver thereof.

On May 13, 1974, the Petitioner was arraigned and plead not guilty by reason of insanity.

The Petitioner applied for an Order to subpoena Dr. Lara as a witness for the defense on May 20, 1974. The order was approved by the Court on the same date.

On June 3, 1974, the Petitioner filed a Notice to Prosecution listing Dr. Lara as one of the witnesses he intended to call at trial.

On June 5, 1974, the State filed a Notice of Additional Evidence indicating that Dr. Lara would testify Petitioner was competent to stand trial and that the Petitioner knew right from wrong and knew he was engaged in wrong acts at time of the alleged offense.

On June 6, 1974, Petitioner filed a Motion in Limine to Suppress Testimony, including the testimony of the psychiatrist alleging the doctor-patient privilege and that the information secured by the psychiatrist was a confidential communication. The State filed a Resistance to Defendant's Motion in Limine and on June 11, 1974, the Defendant's Motion in Limine was overruled by the Court.

Trial was commenced on July 17, 1974, at which Dr. Lara testified on behalf of the State of Iowa during the State's case in chief after objections of the Petitioner's counsel that the Petitioner had not been advised of his rights pursuant to

Miranda v. Arizona 384 U.S. 436 (1966), as to the damaging admissions made by the Petitioner while in the custody of the State of Iowa, being examined and questioned by a psychiatrist employed by the State of Iowa.

There were no oral or written cautionary instructions given to the jury as to limiting the psychiatrist's testimony to a determination of sanity. The jury was free to consider the psychiatrist's testimony regarding the Petitioner's admissions in determining all elements of the offense charged.

On July 18, 1974, the jury returned a verdict of guilty. Petitioner was sentenced on August 1, 1974, to a term of twenty years, with credit received for time served while awaiting trial, in the State Penitentiary at Anamosa, Iowa.

The Petitioner was in the custody of the State of Iowa continuously since the arrest on January 7, 1974, until trial.

As a part of the psychiatrist's testimony, he testified that one of his duties was to evaluate court cases for the State of Iowa. He further stated that as a matter of procedure following an application to analyze an individual, he requests background information from the county where the case arises, including the minutes of evidence. These minutes of evidence are attached to a County Attorney's Information in the State of Iowa and reflect the anticipated testimony of the State's witnesses. The psychiatrist testified that a patient, depending on one's orientation need not tell him what the patient did, only what is alleged, but that he does try to gain as much information as possible from the patient's viewpoint.

When the psychiatrist was conducting the examination, the psychiatrist testified that he did not know whether the request had been initiated by the State or by counsel for the Petitioner.

The Psychiatrist only knew that it was a court ordered evaluation.

When asked whether the Petitioner was ever given the Miranda warning, the psychiatrist replied, "Not formally." The record is silent on explanation, of what rights, if any, where informally explained to the Petitioner by the psychiatrist. There was not testimony introduced by the State that the Petitioner waived his rights afforded by the Fifth Amendment of the United States Constitution or that the Petitioner was properly advised by the psychiatrist of those rights or any other Constitutional rights due to him.

Subsequent to the counsel for the Petitioner's objection, the psychiatrist was allowed to testify that the Petitioner told him he was aware of the testimony against him and did not contradict its substance. This statement was made to the psychiatrist as a part of his attempt to obtain background information. The psychiatrist stated he spent approximately seven hours with the Petitioner in gathering background information.

The psychiatrist was further allowed to testify that during "the discussions that you the psychiatrist had with Gary Collins" the Petitioner told him that he had asked the alleged victim "What do you think of rape". The psychiatrist was further allowed to testify that the Petitioner stated he threw the victim in bed, remarking, "I am going to ball you" and that the victim began screaming and the Petitioner stripped off the victim's clothing. The psychiatrist further testified that Petitioner admitted that at the time of these acts, he was both angry and lustful, willing to get his pleasure from anyone available. After defendant's counsel had earlier objected based on *Miranda* supra, and has those objections overruled, he objected on the grounds of hearsay to the statements in this paragraph.

The victim, at the time of trial, could not positively identify the Petitioner as the assailant. The psychiatrist's testimony, therefore, regarding the admissions of the Petitioner, was crucial to the eventual finding of guilt by the jury.

The psychiatrist who testified as to the admissions the Petitioner made to him during the course of the court ordered examination for competency and the conversations and discussions the psychiatrist had with the petitioner pursuant thereto, also testified that from about four or five days after the Petitioner's admittance through the remainder of his stay at the institution, the Petitioner was placed on major tranquilizer medication by him.

As the Statement of the Case indicates the defendant's Counsel objected based on *Miranda* when the State first sought to introduce incriminating statements made by the defendant to the psychiatrist. The Court overruled the defenses objections.

These pertinent portions of the transcript are set out in Appendix C.

After the close of Dr. Lara's testimony the defendant moved for a mistrial based on a violation of the defendant's constitutional rights against self-incrimination and that the defendant was given no Miranda warning. The Court denied the motion for mistrial. [Tr. Page 46, 13-25; 47, 1-7]

On July 23, 1974, the defendant's counsel moved to have the verdict of guilty vacated and a new trial granted. One of the grounds of this motion was that "the defendant's constitutional right against self-incrimination was violated with the testimony of the witness, Dr. Lara, when he disclosed and reported statements made by the defendant confessing his guilt to the charges and the warning against self-incrimination had not been

given by Dr. Lara". This motion was denied by the Court on July 29, 1974.

At the appellate level the defense Counsel raised the issue by the assignment of error alleging that the trial court errored "in failing to sustain the defendant's objection to the testimony of prosecuting witness, Dr. Lara, which appears to be a violation of the defendant's constitutional right against self-incrimination". As stated, supra, the Supreme Court of Iowa rejected this assigned error and affirmed the conviction on December 17, 1975.

REASONS FOR GRANTING THE WRIT

I. IN THIS CASE THE IOWA SUPREME COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE; THAT THE TEACHINGS OF *MIRANDA V. ARIZONA*, 344 U.S. 436 (1966)ARE NOT APPLICABLE TO CONFESSIONS OF A DEFENDANT TO A STATE PSYCHIATRIST WHILE THE DEFENDANT IS IN CUSTODY DURING THE COURSE OF A STATE ORDERED MENTAL EXAMINATION REGARDING COMPETENCY TO STAND TRIAL, A QUESTION WHICH HAS NOT BEEN THERETOFORE DETERMINED BY THE SUPREME COURT OF THE UNITED STATES.

II. THAT THIS CASE PRESENTS A SERIOUS QUESTION AS TO THE FUNDAMENTAL FAIRNESS WHICH SHOULD BE AFFORDED A DEFENDANT IN THAT IN SEEKING TO DETERMINE COMPETENCY TO STAND TRIAL AND ASSIST IN HIS OWN DEFENSE, STATEMENT MADE BY THE DEFENDANT SHOULD NOT BE USED TO PROVE ELEMENTS OF THE OFFENSE CHARGED.

III. THAT THE HARSH ALTERNATIVES PRESENTED BY THIS CASE, EITHER TO WAIVE A DEFENDANT'S

RIGHT TO HAVE HIS COMPETENCY TO STAND TRIAL AND ASSIST IN HIS OWN DEFENSE DETERMINED OR TO WAIVE A DEFENDANT'S RIGHT AGAINST SELF INCRIMINATION, DEMONSTRATES A SIGNIFICANT NEED TO EXPAND THE PROTECTION TO BE AFFORDED A DEFENDANT SO THAT ONE RIGHT WILL NOT HAVE TO BE SURRENDERED TO ASSERT ANOTHER.

A review of the decisions of the Surpeme Court of the United States indicates that the questions presented in this Petition for Writ of Certioriari have yet to be decided. No specific Supreme Court case law precedent regarding the applicability of *Miranda v. Arizona*, 384 U.S. 436 (1966) and the effect of Fifth, Sixth and Fourteenth Amendment rights by the admission as a part of the state's case in chief of the confession of a defendant to a state psychiatrist during the course of a court ordered examination while the defendant was in the custody of a state security medical facility have been located.

Presently, however, the Supreme Court has before it the issue of whether *Miranda, supra* will be extended to exlude a confession of a parolee to his parole officer while the parolee was in custody. *Ohio v. Gallagher*, 38 Ohio St2d 291, cert. granted 420 U.S. 1003, 43 U.S.L.W. 3527 (March 31, 1975).

While the Supreme Court has yet to address specifically the issue, various Circuit Courts of Appeals have been initiating consideration of the effect on a defendant's Fifth, Sixth, and Fourteenth Amendment rights when a government psychiatrist testifies at trial regarding statements made by a defendant to him.

In the Ninth Circuit, *Ramer v. United States*, 411 F.2d 30 (9th Cir. 1969) the court was unwilling to extend the mandate

of *Miranda* to testimony of prison physicians as to a routine examination or to prison psychiatrists as to usual and routine psychiatric examinations where the testimony was limited to an opinion as to sanity. However, the issue was not before the court as to the admissibility of evidence concerning exculpatory or inculpatory statements of a defendant. *Ramer, supra,* at 38.

In *United States v. Albright,* 388 F.2d 719 (4th Cir. 1968) the Court held that the defendant's privilege against self incrimination was not violated by the government's introduction into evidence of statements not relating to guilt made by the defendant to the government's psychiatrist during a court ordered mental examination pursuant to 18 U.S.C. § 4244 . While 18 U.S.C § 4244 specifically provides against using evidence obtained on the issue of guilt as a result of such an examination, the court went on to state that such evidence should be excluded even if not prohibited by statute. The court stated in *Albright, supra,* at 725:

> "To repeat an earlier statement, the purpose of the examination is not to determine whether a defendant did or did not do the criminal acts charged, but whether he possessed the requisite mental capacity to be criminally responsible therefor, if other proof establishes that he did do them. So limited, we find nothing in the examination, over a defendant's objection, to violate a defendant's privilege against self-incrimination.
>
> When an examination is conducted pursuant to 18 U.S.C.A. 4244, the statute is quite specific that no statement made by the accused in the course of examination shall be admitted in evidence on the issue of guilt in any criminal proceeding. This is due recognition that infringement of the privilege may result if the disclosure made by a defendant in the course of examination touching upon the guilt are used against him. Even if an examination is required, not under 18 U.S.C.A. 4244, but under a court's inherent power to require an examination, the same recognition should be given to the privilege.

United States v. Bohle, 445 F.2d 54 (7th Cir. 1971) also discussed an 18 U.S.C. § 4244 statutory examination. The Court seemed to recognize a Fifth Amendment privilege for non-disclosure of guilt indicating statements made to psychiatrists by noting that the restrictions in 18 U.S.C. § 4244 create a "... minimal risk to the Fifth Amendment privilege ..." and that the rights of the defendant are fully protected by this exclusionary rule." *Bohle, supra,* at 66-67.

While the above cases all involve a 18 U.S.C. § 4244 hearing, with its statutory prohibition to the introduction of admissions as to guilt, the cases are useful to emphasize the concern of the Courts regarding the privilege of self-incrimination in psychiatric examinations.

In *United States v. Alvarez,* 519 F.2d 1036 (3rd Cir. 1975) the Third Circuit reversed the United States District Court for the District of New Jersey which allowed into evidence statements made to a psychiatrist during a court ordered mental examination which tended to establish the offense. The Court stated in *Alvarez, supra,* at 1042:

> This Circuit is committed to the position that use at trial of statements exacted by compulsion of a court ordered psychiatric examination, at least where any statement elicited in the examination tends to establish the fact of the offense or the voluntariness of other statements of the accused, is a violation of the privilege against self incrimination.

The extension of the *Miranda* application to the court ordered psychiatric examination in those cases where no

statutory safeguards exist to protect against self incrimination is a logical extension of the Fifth Amendment right against self-incrimination.

As stated in *Counselman v. Hitchcock,* 142 U.S. 547, 562 (1892) the privilege against self-incrimination "is as broad as the mischief against which it seeks to guard."

The Petitioner, Gary James Collins, clearly was in custody of the state. He was being examined by a state psychiatrist, at a state institution pursuant to an order of a state court. The state psychiatrist had the proposed testimony of the state's witnesses during the course of the examination discussions and conversation with the defendant; examination, discussions and conversations in which the psychiatrist seeks to gain as much information from the defendant as possible.

The situation in which the defendant was placed was a mischief to be guarded against by the privilege. Although the original application was at the request of the defendant, the mental examination was at the compulsion of the state. All statements made by the defendant were a part of an overall compelled examination.

The defendant should not be compelled to elect between his right against self-incrimination and his right to a determination of his competency to stand trial and be of assistance to his counsel. As stated in *Simmons v. United Stated,* 390 U.S.377 (1968) at 394:

> [I]t [is] intolerable that one constitutional right should have to be surrendered in order to assert another.

The "fair state-individual balance" of *Miranda, supra*

should eliminate the unbridled testimonial use of a defendant's self-incriminating statements made in the course of a state-ordered examination.

A recent decision of the Court, *Maness v. Meyers,* 419 U.S. 449 (1975) emphasizes the traditional broad construction which has been given to the Fifth Amendment privilege against self-incrimination. This broad construction should be extended to include the situation presented in this case.

Based upon the Court's concern for the Fifth, Sixth, and Fourteenth Amendment rights of an individual the issues before the court in this case are fundamental and substantial. This case also presents the problem of fundamental fairness in a criminal trial where a defendant's due process will be violated if he is forced to elect between Constitutional rights or is not afforded his Fifth Amendment rights. Such a forced election would not be necessary if the Court would extend the Fifth Amendment protection and the application of *Miranda,* supra, to interviews by a state psychiatrist of a defendant in a state security medical facility during the course of a court ordered mental examination on competency to stand trial.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Iowa.

Respectfully submitted,

KEITH E. UHL
Scalise, Scism, Gentry, Brick & Brick

APPENDIX A

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	Filed December 17, 1975
	)	
Appellee,	)	
	)	242
v.	)	57558
	)	
GARY JAMES COLLINS,	)	
	)	
Appellant.	)	

Appeal from Jasper District Court — M.J.V. Hayden, Judge.

Appeal by defendant from conviction and sentence for assault with intent to commit rape in violation of § 698.4, The Code.-- AFFIRMED.

Frank M. Krohn, of Newton, for appellant.

Richard C. Turner, Attorney General, John G. Mullen, Assistant Attorney General, and Kenneth L. Whitehead, County Attorney, for appellee.

Considered en banc.

McCORMICK, J.

Defendant appeals his conviction and sentence for assault with intent to commit rape in violation of § 698.4, The Code. The questions presented are whether the trial court erred (1) in overruling defendant's motion to dismiss for want of a speedy

trial, (2) in overruling his motion for mistrial, (3) in overruling his *Miranda* objection to testimony of a psychiatrist, and (4) in overruling his motion for directed verdict made at the close of the evidence.

I.

The charge in this case was brought by county attorney's information filed January 28, 1974. Defendant filed a motion to dismiss on July 8, 1974, alleging he had been denied his right under § 795.2, The Code, to be brought to trial within 60 days of the filing of the county attorney's information. The State contended good cause existed for the delay, and the trial court overruled the motion on that ground. Defendant's trial commenced July 17, 1974.

Since defendant was not tried within 60 days after the charge was brought in district court, he was entitled to have the charge dismissed on his timely motion unless the State demonstrated good cause for the delay beyond that period.

Applicable principles are summarized in several recent cases. See e.g., *State v. Albertsen,* 228 N.W.2d 94, 97-98 (Iowa 1975). In this case, we agree with the finding that good cause for delay was shown. The delay was substantially attributable to defendant. The first three months' delay was caused by compliance with an order of the court sustaining defendant's motion for mental evaluation. Defendant was admitted to the medical security facility at Oakdale for mental examination and evaluation in February and was not released until April 30, 1974. He filed a demand for speedy trial seven days later, on May 7, 1974. At his arraignment on May 13, 1974, he entered a plea of not guilty. On June 3, 1974, he filed a notice of his intention to rely upon a defense of insanity. § 777.18, The Code. One of the listed witnesses was Dr. Romullo Lara, a

psychiatrist who had examined defendant at Oakdale. Two days later the State filed a notice of additional testimony indicating its intention to call Dr. Lara as a State witness. Additional time was taken by a motion in limine filed by defendant. Further delay was caused by fixing the trial date to accommodate Dr. Lara's schedule.

Under this record, the trial court did not err in overruling defendant's motion to dismiss.

II.

Defendant's motion for mistrial resulted from testimony of Dr. Lara as a witness for the State. The witness recited the history taken from defendant. Included in the history was a statement that, "He says * * * he is charged with assault with intent to commit rape, as well as aiding and abetting a jail break." Later, out of the presence of the jury, defense counsel moved for mistrial on the ground this testimony improperly referred to an escape charge for which defendant was not then on trial. The trial court overruled the motion but admonished the jury to disregard the challenged testimony.

A trial court has discretion in ruling upon a motion for mistrial, *State v. Cage,* 218 N.W.2d 582, 586 (Iowa 1974). The limits of that discretion were not exceeded here.

III.

A second problem arose during Dr. Lara's testimony. He testified he did not require defendant as part of the psychiatric examination to relate his version of the events upon the assault with intent to commit rape charge was based. Nevertheless, he said defendant wished to explain his version of the incident and did so. When Dr. Lara was asked to repeat what defendant told

him, defense counsel objected on the ground defendant had not been given *Miranda* warnings. The objection was overruled, and Dr. Lara repeated defendant's alleged statements.

The sole issue raised in defendant's assignment of error is whether statements made by a defendant to a state psychiatrist examining him pursuant to a court order entered upon the defendant's application are admissible against the defendant at trial when the statements were made without prior *Miranda* warnings to the defendant by the psychiatrist. Defendant contends Dr. Lara should have advised him of his privilege against self-incrimination before discussing the charge with him. See *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

In *Miranda,* the Supreme Court barred the use of statements "stemming from custodial interrogation of the defendant unless [the prosecution] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The court added, "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706. We have held *Miranda* prohibits law enforcement officials from eliciting incriminating statements by having a third party ask their questions for them. *State v. Flaucher,* 223 N.W.2d 239 (Iowa 1974); *State v. Cullison,* 215 N.W.2d 309 (Iowa 1974). However, this case does not present that kind of situation. Defendant was not being subjected to custodial interrogation nor was he being questioned in behalf of law enforcement officers. The *Miranda* warnings were not required. See *Ramer v. United States,* 411 F.2d 30, 38 (9 Cir. 1969), cert. denied, 396 U.S. 965, 90 S.Ct. 445, 24 L.Ed.2d 431 ("We are unwilling to expand the mandate of *Miranda* to the extent sought by the appellant."). See

generally, Marcus, Pre-Trial Psychiatric Examination: A Conflict With the Privilege Against Self-Incrimination, 5 Crim. L. Bull., No. 10, 497.

The trial court did not err in overruling his defendant's objection to Dr. Lara's testimony.

IV.

In contending the trial court erred in overruling his motion for directed verdict made after both parties rested, defendant asserts the evidence was insufficient for jury consideration on the element of intent. The same argument was made and rejected in *State v. Baskin,* 220 N.W.2d 882, 887-888 (Iowa 1974). No useful purpose would be served by reciting the evidence in this case. It suffices to say that here, as in *Baskin,* the evidence was sufficient to support a fair inference by the jury that defendant had in mind the procurement of sexual intercourse by the use of such force as was necessary to accomplish his purpose.

The trial court did not err in overruling his motion for directed verdict.

We find no merit in defendant's assignments of error.

AFFIRMED.

All Justices concur, except Rawlings, J., who concurs specially.

RAWLINGS, J., (concurring specially)

Confining myself, as does the majority, to the sole "Miranda warning" issue asserted by defendant in support of a reversal, I too find an affirmance is in order.

On the other hand, the situation instantly involved is to me of such magnitude as to justify if not necessitate some overview regarding self-incirminating statements made by an accused in course of a court-ordered psychiatric examination as to sanity at time of the event.

I.

At the outset most, if not all, courts have approached the problem from two separate but interrelated avenues, i.e., court-complelled vs. defense-invited evaluations. It still remains, however, no meaningful evaluation can be achieved in either such instance other than by a thorough, wide-ranging and intimate discussion between an accused and a psychiatrist, designed to elicit in-depth information from the former regarding past crimes or antisocial conduct, personality-molding experiences and subconscious motivating ideas. See *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763, 771 (1965); Meyers, "The Psychiatric Examination", 54 J. Crim. L.C. & P.S. 431 at 435-438 (1963). And any inhibition, direct or indirect, which may be fastened upon such essential dialogue is self-defeating[1],

[1] 26 Stan. L. Rev. 55, 66 (1973).

at the same time often beset with tangential troublesome problems, illustratively coercion[2], and possible confinement in perpetuity for defendant's noncooperation.[3]

II.

At this point the matter of self-accusation comes into play.

Admittedly, *Schmerber v. State of California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) says the Fifth Amendment protects an accused only from being compelled to testify against himself, *or otherwise provide the State with evidence of a testimonial or communicative nature*. 384 U.S. at 760-761, 86 S.Ct. 1830-1831.

The *Schmerber* Court also distinguished between admissibility of a blood test on one hand and "compelling communications or testimony" or "compulsion which makes a suspect or accused the source of real or physical evidence." 384 U.S. at 764, 86 S.Ct. at 1832.

It therefore follows, a blood sampling stands on a different footing than does a psychiatric examination. Further in that regard, any determination as to whether statements made in course of the latter are testimonial in nature depends upon usage of the information thus obtained. When employed as evidence going to the issue of guilt or innocence it can be nothing other than communicative or testimonial. See 5 Crim. L. Bull, 497, 501 (1969).

[2] *Leyra v. Denno*, 347 U.S. 556, 559-560, 74 S.Ct. 716, 718, 98 L.Ed. 948 (1954).

[3] *Tippett v. State of Maryland*, 436 F.2d 1153,1161 (4th Cir. 1971); 26 Stan. L. Rev. at 60. See also Code Chapter 665.

In this vein, most courts have adopted the view that an accused must cooperate, if possible, in the conduct of a psychiatric examination. And generally any statements made by a defendant in couse thereof are deemed admissible in evidence *with regard to the matter or legal responsibility*. But when those relating to guilt are admitted, several courts have held the jury must be instructed on the limited probative force of any such self-incirminating statements, i.e., that they are not to be considered in resolving the guilt issue. See *State v. Obstein*, 52 N.J. 516, 247 A.2d 5, 11-12 (1968); *State v. Whitlow, supra.* Noticeably, however, *Whitlow* recognized the inherent difficulty juries would inevitably encounter in attempting to obey any such instructional restriction. 210 A.2d at 773.

Moreover, validity of the aforesaid procedure is at best doubtful. In *Jackson v. Denno*, 378 U.W. 368, 388-389, 84 S.Ct. 1774, 1786-1787, 12 L.Ed.2d 908 (1964), the Court unmistakably condemned the practice of submitting to a jury the question of voluntariness of a confession together with the guilt issue. By the same token, when a jury, as in the case at bar, has heard a psychiatrist relate incriminating statements made to him by an accused during a mental examination, those utterances unavoidably become so deeply implanted no juror could disregard them even though told by the court to do so. In any event, it will usually if not always, be subconsciously the decisive factor whenever uncertainty lingers in the mind of a juror as to proof of guilt beyond a reasonable doubt.

A few jurisdictions have attempted to circumvent the above quandary by adoption of a bifurcated hearing or "sequential order of proof" approach. Such is, however, a relatively cumbersome and expensive procedure to be avoided where reasonably possible. See Louisell & Hazard, Insanity as a Defense: The Bifurcated Trial, 49 Calif. L. Rev. 805 (1961); 5

Crim. L. Bull. 497, 504 (1969); 10 Am. Crim. L. Rev. 431, 458-463 (1972). I shall later return to this subject.

Another proposed solution, voiced in *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967), is adoption of the "waiver" theory where an accused has requested the psychiatric examination. See generally *United States v. Schultz*, 431 F.2d 907, 911 (8th Cir. 1970). But see *Commonwealth v. Pomponi*, 447 Pa. 154, 284 A.2d 708, 710-711 (1971). Several troublesome questions are also here involved. Surely, an insanity plea cannot be equated with intentional waiver of the Fifth Amendment privilege against self-incrimination. Otherwise, a defendant is placed on the horns of an imponderable dilemna. By electing to assert an insanity defense he waives his privilege against self-incrimination. The unconscionability of this paradox is self-evident. As observed in *State v. Raskin*, 34 Wis.2d 607, 150 N.W.2d 318, 326 (1967):

> "It is argued also by the state the filing of the plea of insanity waives any privilege of self-incrimination and therefore the accused must answer questions in the examination even though the responses may be incriminatory. We do not agree. This concept puts a *quid pro quo* or price tag on the assertion of the plea of insanity."

Touching on the same point is *Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247 (1968) where the Court declared: "[I]t [is] intolerable that one constitutional right should have to be surrendered in order to assert another." See also 10 Am. Crim. L. Rev. at 450-452.

I further find more than minimal cogency in this statement by Black, J., dissenting in *Williams v. Florida*, 399 U.S. 78, 112, 90 S.Ct. 1893, 1912, 26 L.Ed.2d 446 (1970):

> "The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: 'Prove it!' "

It is also well settled, in this jurisdiction, that if an accused pleads not guilty by reason of insanity the State must prove, beyond a reasonable doubt, all elements of the offense charged, including defendant's legal capacity to commit the offense. See *State v. Thomas,* 219 N.W.2d 3, 5 (Iowa 1974); case note, 24 Drake L. Rev. 246 (1974); Annot., 17 A.L.R.3d 146.

By virtue thereof it has been held that when a defendant places his or her sanity in issue the State may have benefit of a concomitant psychiatric examination. See *United States v. Schultz,* 431 F.2d at 910-911; *United States v. Albright,* 388 F.2d 719, 722-726 (4th Cir. 1968); *State v. Whitlow, supra; Lee v. County Court of Eric County,* 27 N.Y.2d 432, 318 N.Y.S.2d705, 712, 267 N.E.2d 452, 457, cert. denied 404 U.S. 823 (1971). See also Breitel, J., concurring in *People v. Avant,* 33 N.Y.2d 265, 352 N.Y.S.2d 161, 167, 307 N.E.2d 230, 234 (1973); 26 Stan. L. Rev. at 63-65. But see *United States v. Davis,* 496 F.2d 1026, 1030-1031 (5th Cir. 1974); *Commonwealth v. Pomponi,* 284 A.2d at 709-711. Here again, the above noted coercion problem is involved. Additionally, the defendant may be inclined to deceive and suppress evidence while being thus compulsorily examined. See 26 Stan. L. Rev. at 66.

Finally, on this subject, it is questionably whether the "waiver" concept is legitimately applicable in a situation such as instantly presented. See *State v. Holderness,* 191 N.W.2d 642,

646 (Iowa 1971). See also *People v. Avant, supra;* 83 Harv. L. Rev. 648, 667 (1970).

Mindful of the foregoing, it is to me apparent the unbridled testimonial use of a defendant's self-incriminating statements to a psychiatrist in course of an examination as to the accused's sanity at time of the event is beset with unavoidable perplexities and an insurmountable fair-play barrier.

III.

The spotlight now focuses upon a defense-invited psychiatric analysis as opposed to compelled evaluation of defendant's mental status stemming from a prosecution request or sua sponte court order.

First considered is the examination brought about by reason of an indigent defendant's request. See Hall, Kamisar, LaFave and Israel, Modern Criminal Procedure, 151-159 (3d ed 1969); Annot., 34 A.L.R.3d 1256, 1275-1282. In such event the accused is supplied the benefit of a medical diagnosis at State expense which he, if affluent, could have otherwise obtained. See *Griffin v. People of the State of Illinois,* 351 U.S. 12, 19, 76 S.Ct. 585, 591, 100 L.Ed 891 (1956). And, as this court said in *State v. Bedel,* 193 N.W.2d 121, 124 (Iowa 1971):

> "The physician-patient privilege is intended to foster free and full communication between the physician and the patient in diagnosis or treatment of the patient's ills. This privilege is not designed, nor will it be so extended, to act as a shield behind which a patient may conceal information, though made to his physician, which is not necessary and proper to enable the physician to perform his profession skillfully. See *Gibson v. Ladd,* Blood Test to Determine Intoxication, Physician-Patient Privilege, 24

Iowa L. Rev. 191, 255-256 (1939); Wigmore, Evidence, § 2380a, pp. 828-832."

It could therefore be plausibly argued the physician-patient privilege is applicable to any such defense-invited examination. Supportively, the court said in *State v. Evans,* 104 Ariz. 434, 454 P.2d 976, 978 (1969):

> "The obvious policy underlying the physician-patient privilege is that patients should be encouraged to make full and frank disclosures to those who are attending them. While we do not believe that allowing [a doctor] to testify about his conclusions concerning defendant's sanity derogates from this policy, we do think that to permit even a psychiatrist acting for the court to transmit a defendant's incriminating statements to a jury is fundamentally unfair. In *Lisenba v. People,* 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941), Justice Roberts stated: 'The aim of the requirement of due process is * * * to prevent fundamental unfairness in the use of evidence whether true or false.' 314 U.S. at 236, 62 S.Ct. at 290."

Understandably, the defendant may waive any such privilege, either intentionally or by invitation, i.e., "opening the door" in course of trial. See *United States v. White,* 377 F.2d 908, 911 (4th Cir. 1967), cert. denied, 389 U.S. 884, 88 S.Ct. 143. See generally McCormick on Evidence, § 134 (2d ed 1972). But as to waiver by absence of testimonial objection see *United States v. Davis,* 496 F.2d at 1030-1031.

Next entertained is the matter of compulsory psychiatric examination of an accused, either upon request by the prosecution or sua sponte order of the court. Here the psychiatrist becomes an agent for the State. Singularly pertinent is this statement from In re Spencer, 46 Cal.Rptr. 753, 406 P.2d 33, 40 (1965):

> "In Massiah v. United States, supra, 377 U.S. 201, 206, 84 S.Ct. 1199, 1203, 12 L.Ed.2d 246, the United States Supreme Court held that 'the petitioner was denied the basic protections of that guarantee [of counsel] when there was used against him at his trial evidence of his incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.' Although the court-appointed psychiatrist, an agent of the court, does not necessarily seek to elicit incriminating statements for use by the prosecution as did the agent in Massiah, he does question a defendant about the facts of the crime, and any incriminating statements of a defendant so procured may be utilized by the prosecution at the guilt trial.
>
> "The fact that the purpose of the psychiatric interview is not to gather evidence for the prosecution serves to compound the unfairness of the psychiatrist's testimony; an agent of the court in reality lulls a defendant into making incriminating statements that may be used against him at the guilt trial. (Cf. *Leyra v. Denno* (1954) 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948; Diamond & Louisell, The Psychiatrist as an Expert Witness: Some Ruminations and Speculations (1965) 63 Mich.L.Rev. 1335, 1349.) The psychiatric examination occurs during a ' "critical period of the proceedings" ' (*Massiah v. United States, supra,* 377 U.S. 201, 205, 84 S.Ct. 1199, 12 L.Ed. 2d 246); if defendant's statements to the psychiatrist may be introduced at the guilt trial, defendant's need of counsel is as acute during the psychiatric interview as during the police interrogation."

See also Marshall, J., dissenting to dismissal of certiorari in *Miller v. State of California,* 392 U.S. 616, 88 S.Ct. 2258, 20 L.Ed.2d 1332 (1968); cf. *State v. Cullison,* 215 N.W.2d 309, 314-315 (Iowa 1974).

It may therefore be reasonably contended the Fifth Amendment privilege becomes applicable in the above noted

situation. See Harlan, J., concurring in *California v. Byers,* 402 U.S. 424, 435-437, 91 S.Ct. 1535, 1541-1542, 29 L.Ed.2d 9 (1971); *United States v. Albright,* 388 F.2d at 726; *State v. Obstein,* 247 A.2d at 10-11; *Haskett v. State,* 255 Ind. 206, 263 N.E.2d 529, 531 (1970); 8 Wigmore on Evidence, §§ 2251-2252 (McNaughton rev. 1961); 10 Am. Crim. L. Rev. at 434-458; 5 Crim. L. Bull. at 500-506.

There may also be some degree of authenticity in an argument to the effect the physician-patient privilege is here again applicable. See *State v. Evans, supra.*

IV

The foregoing panoramic backdrop of untoward elements makes it to me evident the problem at hand can and should be resolved by adoption of a suitable, inoffensive and realistic standard.

I would therefore hold that where a defendant is examined as to his or her sanity as bearing upon the accused's criminal responsibility for the act charged, whether such be initiated by the defendant, the prosecution or sua sponte order of the court, any self-incriminating information obtained from an accused in course thereof shall not be admitted in evidence, over appropriate objection, during trial of the examined defendant in which guilt or innocence is to be determined. See *United States v. Davis,* 496 F.2d at 1030-1031; *People v. Stevens,* 386 Mich. 579, 194 N.W. 2d 370, 371-373 (1972). The aforesaid objection can, of course, be effectively voiced before trial. See *State v. Untiedt,* 224 N.W.2d 1, 3 (Iowa 1974).

It is understood, however, that if defendant (1) first knowingly consents to the introduction of such otherwise precluded testimony or (2) opens the door to the subject matter

in course of trial, he may not then effectively complain since his own strategy has invited presentation of such evidence. See *United States v. Davis,* 496 F.2d at 1030.

The foregoing standard is, in my humble opinion, essential to a fair trial while still permitting introduction of other admissible opinion evidence regarding a defendant's sanity at time of the event.

V.

If, however, it be found that a psychiatrist is unable to testimonially evaluate defendant's legal responsibility absent reference to incriminatory statements made by the accused, then a bifurcated hearing would be unavoidable and appropriate. In that event, trial on the guilt issue should be first held and if the accused is found guilty a jury determination as to legal responsibility would follow. See generally *Contee v. United States,* 410 F.2d 249, 250 (D.C. Cir. 1969); *Holmes v. United States,* 363 F.2d 281, 282-283 (D.C. Cir. 1966); *State v. Raskin,* 150 N.W.2d at 326; 10 Am. Crim. L. Rev. at 458; 5 Crim. L. Bull. at 504; 1964 Wis. L. Rev. at 681.

Of course, justice would be better served and the procedural process expendited by a pretrial ascertainment regarding the psychiatrist's ability to express his or her opinion as to defendant's legal responsibility without reference to self-incriminating statements by the accused. See *State v. Peterson,* 219 N.W.2d 665, 668-669 (Iowa 1974).

Whether separate juries must be provided should a bifurcated hearing be necessary is a question which need not be now resolved. Compare 10 Am. Crim. L. Rev. and 5 Crim. L. Bull, both *supra,* with 1964 Wis. L. Rev. cited above. See also *State v. Monroe, N.W.2d (Iowa, November 1975).*

APPENDIX B

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI:

> "In all criminal prosectuions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Constitution of the United States, Amendment XIV:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX C

TRANSCRIPT OF TESTIMONY OF DR. ROMULLO LARA:

[Page 10, lines 8-11 and 16-17:]

"MR. KROHN: This is objected to on the grounds that there is no proper foundation. There is no showing that the defendant has been given the Miranda warnings.

THE COURT: Overruled at this time.

MR. KROHN: Same Objection.

THE COURT: Same ruling.

[Page 11, Lines 15-25, Page 12, Lines 1-11:] This is the letter that I sent to this Court: Mr. Gary James Collins is a 24 year old, single man, who resides in Madison, Wisconsin. He was admitted to this hospital for psychiatric evaluation "to evaluate his competency to stand trial." He says that he is carged with Assault with Intent to Commit Rape, as well as Aiding and Abetting a Jail Break. He was arraigned on both of these charges, but was unable to meet bond. A piea of not guilty has been entered.

According to the furnished information from the office of the County Attorney, on the evening of January 6, 1974, Mr. Collins had knocked on the door of a Mrs. Jesse Andrews, 80 years of age, of 500[First Avenue, East, Newton,; that he had asked if he might use her telephone to call a friend in Lambs Grove; that she had obliged him, but that he had ripped the wire off the telephone so that she could not call for help. He then said he was going to rape her, but she had resisted, whereupon the defendant began stripping and beating her. No rape was performed; however, a witness had seen Mr. Collins dashing down the stairs and head west. Seemingly, foot prints in the snow matched those of his boots.

[Page 13, Lines 3-12 and 14-17:] "Since his birthday was nearing, he decided to take off from work for three days between January 4 and January 6, finding lodging in the Churchill Hotel in Newton. He would drink by day and return to Lambs Grove for the night. He says that on that particular evening of January 6, he had been feeling cold, and had approached the residence of the victim, originally to seek comfort. He is aware of the testimonies against him, and does not contradict their substance." Would you like me to continue?"

MR. KROHN: This is objected to and we move that the testimony be stricken for the reason that the defendant was not given the miranda warning.

THE COURT: Overruled.

[Page 22, Lines 7-9:] MR. KROHN: This is objected to as not including the Miranda warning.

THE COURT: Overruled:

[Page 24, Lines 4-12:] MR. KROHN: Comes now the defendant through his attorney Frank M. Krohn and moves the Court to declare a mistrial in this case for the reason that the testimony of the witness Dr. Lara disclosed additional pending criminal charges against the Defendant in Story County, Iowa claiming an escape, and for this reason we feel the testimony is inconsistent with this trial and is a violation of the defendant's right and should entitle the defendant a trial before another jury.

[Page 25, Lines 4-8:] THE COURT: The Court will overrule the defendant's motion for Mistrial at this time. The Court will admonish the jury. The Court feels there has been no prejudice

generating as a result of any mention of any other offense other than the present one which is before the Court and jury.

[Page 27, Lines 10-25:] MR. KROHN: This is objected to again as hearsay.

THE COURT: Overruled. This is a quote from the psychiatric history "Since November, 1973, he had been employed in Iowa working for Confinement Construction Company. He shared a room with a co-employee in Lambs Grove, and this friend would drive him to work. Since his birthday was nearing, he decided to take off from work for three days between January 4 and January 6, finding lodging in the Churchill Hotel in Newton, and he had been drinking in that town, and after returning to Lambs Grove that particular evening, January 6th, he had been hitchhiking along Highway 6 at about ten p.m., and caught sight of a home which is three units housing different families. Feeling quite cold, he had approached this residence going up the stairs and knocking on the door. The victim accommodated--

[Page 28, Lines 1-25:] him and he had requested to use her telephone so he could call his friend "Deano" to fetch him. His firend, however, was unavailable. Mrs. Andrews, in the meantime had served him a cup of coffee and peanut butter sandwich. He introduced himself and told her where he was employed. It was then that he asked, "What do you think of rape?" She was startled and seemed panic-stricken. She responded, "I think you have overstayed your welcome," and had opened the door for him to leave. This angered him and he had bolted the door shut. He threw her in bed and remarked, "I'm going to ball you," and she began screaming and he slapped her. She bit his little finger drawing blood. This further angered him and he beat her and stripped off her clothing. He says that at

that time he was both angry and lustfull willing to get his pleasures from anyone available. No rape was completed, however, saying that when he had stripped her it was sickening to see. Feeling afraid of himself, he ran away by the backyard. He continued to go towards Lambs Grove. He was apprehended by the Sheriff before reaching home.

Originally he was charged for public intoxication. However the police had brought him to the home of the victim. He was further angered that there was a gathering of cameramen who already knew what happened and were

[Page 29, Lines 1-2:] Taking pictures at will." That is the sum total of all this.

APPENDIX D

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO.

GARY JAMES COLLINS,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

CERTIFICATE OF SERVICE

I, Keith E. Uhl, Attorney for the Petitioner, hereby certify that on this 12th day of March, 1976, three (3) copies of the Petition for a Writ of Certiorari were mailed, correct postage prepaid, to:

Richard C. Turner
Attorney General of Iowa
State Capitol
Des Moines, Iowa 50319

I further certify that all other parties required to be served have been served.

KEITH E. UHL
Scalise, Scism, Gentry, Brick & Brick
909 Fleming Building
Des Moines, Iowa 50309
ATTORNEYS FOR PETITIONER

APPENDIX E

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO.

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STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

APPEARANCE

COMES NOW Keith E. Uhl, Scalise, Scism, Gentry, Brick & Brick, 909 Fleming Building, Des Moines, Iowa 50309, and hereby enters his appearance on behalf of Gary James Collins, Petitioner, in the above cause.

Respectfully submitted,

KEITH E. UHL
Scalise, Scism, Gentry, Brick & Brick
909 Fleming Building
Des Moines, Iowa 50309